IN THE

Supreme Court of the United States

October Term, 1971

No. 71-482

WILLIAM E. SEWELL, *Petitioner*

v.

GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 445 F.2d 545 (Pet. 30-43). The opinion of the District Court is unreported (Pet. 27-29). The opinions of the National Labor Relations Board and the Court of Appeals in a companion unfair labor practice proceeding are reported respectively as *International As-*

sociation of Machinists and Aerospace Workers, AFL-CIO, 172 NLRB No. 239, 69 LRRM 1148 (1968), and *Nix* v. *N.L.R.B.,* 418 F.2d 1001 (C.A. 5, 1969).

QUESTIONS PRESENTED

1. Whether an action by an employee alleging that his discharge by his union-employer violates his statutory rights conferred by section 101(a)(1) and (2) of the Labor Management Reporting and Disclosure Act of 1959, brought more than one year after his discharge in a federal district court in Alabama, is time-barred because not "commenced within one year" of his discharge as required by Alabama law for "Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated" (Pet. 32, n. 3).

2. Whether, assuming the action is not time-barred, a union-employer may not discharge an employee, who is also a member of the union, for disobeying his employer's orders in the performance of his job on the ground that, while the conduct of the employee constitutes insubordination in his capacity as an employee, it is also said to constitute his exercise of free speech in his capacity as a member.

3. Whether, assuming the action is not time-barred, the Court of Appeals erred in concluding that no triable issue of fact was presented because, as to the "basic facts underlying the allegations of the complaint, . . . no dispute appears to exist since they are discussed without contradiction by the parties", and they "correspond essentially with the facts found" by the National Labor Relations Board and confirmed by the Court of Appeals in a companion unfair labor practice proceeding (Pet. 33-34).

STATEMENT

Petitioner William E. Sewell brought an action on April 10, 1970, in the United States District Court for the Middle District of Alabama. He alleged in his complaint that he is a member of the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), and was employed by the Union as a Grand Lodge Representative (Comp. ¶¶ 2, 6). He further alleged that he was discharged by the Union on January 6, 1967, in "disregard of rights secured to . . . [him] by Section 101(a)(1) and (2)" of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA) (Pet. 36, n. 10, Comp. ¶¶ 4, 6, 9). According to Petitioner, his discharge violated Section 101(a)(1) because made in "disregard of the right secured to . . . [him] as a member of said union . . . to possess equal rights and privileges with other members of said Association [Union] to vote in referendums of said Association [Union] as he might choose"; and his discharge further violated Section 101(a)(2) because made in disregard of his "right as such member . . . to meet and assemble freely with other members and to express any views, arguments, or opinions . . ." (Pet. 36, n. 10).

Particularizing these conclusory allegations the complaint averred that: (1) Petitioner "was employed by defendant [Union] as a Grand Lodge Representative, and his duties in that capacity were to perform such assignments as an organizer, as should be directed by the then International President" of the Union. (Comp. ¶ 6.) (2) On December 22, 1966, the International President wrote a letter to Petitioner. The letter referred to "a proposal of the Executive Council" of the Union "to eliminate from the constitution"

of the Union "the requirement . . . that all proposed amendments to said constitution, approved by a Convention of the International union, be then submitted to the membership in a special post-convention Referendum for acceptance or rejection . . . ." The elimination of the post-convention referendum was to be submitted to a vote of the members in January 1967. The letter from the International President further referred "to reports received" by him that Petitioner "was opposing" the elimination of the post-convention referendum. The letter concluded with the request that Petitioner " 'report to this office if you have been advising local lodges to vote against the proposition in January; and if you have been opposing the Referendum, give the reasons for such position.' " (Comp. ¶ 7.) (3) Petitioner replied to the International President by letter on December 27, 1966, informing him that Petitioner "had discussed the referendum with many individuals, 'in an opposing approach,' but not with local lodges, and stated his view that the Association [Union] should retain the post-Convention Referendum." (Comp. ¶ 8.) (4) Petitioner received a letter from the International President on January 6, 1967, stating in part that:

> Your position, as stated in your December 27, 1966 letter, together with admitted actions, is insubordination. Therefore, for this reason, your employment with the International Union is terminated immediately upon receipt of this letter . . . . [Comp. ¶ 9.]

(5) Petitioner's status as a member of the Union was not disturbed. (Comp. ¶ 2.) Petitioner requested as relief "[r]einstatement in his employment by the defendant [Union] as Grand Lodge Representative", and compensatory and exemplary damages.

The identical discharge of which Petitioner presently complains as a violation of his LMRDA statutory rights was first adjudicated by the National Labor Relations Board and reviewed by the Court of Appeals as a claimed violation of the National Labor Relations Act. The NLRB General Counsel issued a complaint alleging that Petitioner was discharged, not for insubordination, but for his activity in organizing a union among the staff representatives of the Union. A full evidentiary hearing was held. The NLRB found that Petitioner was discharged because of his insubordination and not for his organizational activities. It found that (69 LRRM at 1151-52):

> A long time Grand Lodge Representative, Sewell admitted that a Grand Lodge Representative is the representative of the International President at all times and that his job is to execute the policies of the International President. In September 1966, the Executive Council of Respondent [Union] voted to submit to the membership an amendment to the Union's constitution which would delete the requirement that proposed constitutional amendments be ratified by the membership after approval by delegates to a Grand Lodge convention. A vote on the proposed amendment was set for January 1967. The International President and the Executive Council strongly endorsed the amendment.
>
> On November 16, 1966, the International President sent to all Grand Lodge Representatives a memorandum enclosing a "fact sheet" setting forth pertinent information and data which could be used in persuading the membership to vote for the amendment. The International President sent the same "fact sheet" to all district and local lodge presidents with a covering memorandum urging that the amendment be adopted. Sewell was present at a meeting in October 1966, at which

General Vice-President Smith told the assembled individuals that the Executive Council was going "all out" to secure repeal of the post convention referendum requirement and that he expected the local lodges, and the Grand Lodge Representatives to support that position.

Sewell acknowledged that he was aware of the importance the Executive Council ascribed to the referendum. Nevertheless, Sewell, who opposed the amendment, campaigned against its adoption. The International President learned of this opposition and on December 22, 1966, wrote Sewell:

> It has been reported to this office that you are opposing the January Referendum eliminating the post-Convention Referendum.
>
> You are requested to report to this office if you have been advising local lodges to vote against the proposition in January; and if you have been opposing the Referendum, give the reasons for such position.

Sewell answered on December 27 admitting his opposition to the proposed amendment and stating that he had "discussed the Referendum with *many individuals* in an opposing approach, not with local lodges," and giving his reasons for his opposition. After receiving this reply, the International President notified Sewell of his discharge for insubordination, explaining:

> Grand Lodge Representatives are on the Staff for the sole purpose of assisting the Executive Council, including the International President, in carrying out their duties and responsibilities. Many times it is necessary to make new decisions regarding various subject matters, depending upon the period of time we are living in. In the instant case it was the best judgment of the Executive Council that the time had arrived when we should modernize our Union and do away with the post-convention referendum.

> Your position, as stated in your December 27, 1966 letter, together with admitted actions, is insubordination. Therefore, for this reason, your employment with the International Union is terminated immediately upon receipt of this letter.

The NLRB concluded that Petitioner "was insubordinate" (69 LRRM 1152). It observed that "he was striving to defeat a measure which the Executive Council strongly supported and concerning which it had indicated its position in letters and talks to officers of local unions and Grand Lodge Representatives" (*ibid.*). It noted that "[t]here is no evidence that . . . [the Union] tolerated . . . bifurcating of a Grand Lodge Representative, so that as a member of the Union he could with impunity urge fellow members to vote one way, while as a paid representative of that union he was under instructions to urge members to vote in a diametrically opposite way" (*ibid.*). The NLRB concluded that Petitioner's insubordination, and not his organizational activity, was the real reason for his discharge, and it accordingly dismissed the complaint (*ibid.*).

The Court of Appeals affirmed the NLRB's conclusion upon full review of the record. It summarized the factual background of Petitioner's discharge as follows (418 F.2d at 1008-09):

> The Board found that IAM discharged Sewell because of his failure to support (and even opposition to) an amendment to the IAM constitution which would eliminate its post-convention referendum. The record clearly shows that Sewell had knowledge of the IAM's desire to have the amendment passed and its dependence upon Grand Lodge representatives (including Sewell) to support actively the amendment's passage among IAM mem-

bers. With this knowledge, Sewell actively opposed the amendment. For his opposition Sewell was discharged for insubordination.

The Court of Appeals next observed that (*id.* at 1009):

> A discharge for refusal to obey instructions does not violate sections 8(a)(3) and 8(a)(1) .... The duty of a Grand Lodge representative is to promote and execute the policy of IAM's Executive Counsel and the IAM president as their representatives. As a Grand Lodge representative, it was Sewell's obligation to support IAM's decision to support the amendment, regardless of Sewell's personal views. As the Board stated: "There is no evidence that [IAM] tolerated this bifurcating of a Grand Lodge Representative so that he could with impunity urge fellow members to vote one way, while as a paid employee he was under instructions to urge members to vote in a diametrically opposed way."

The Court of Appeals finally observed that Petitioner's status as a member did not justify his disregard of his job obligations as an employee (*id.* at 1009):

> [It is contended] that Sewell was exercising his membership rights *as a member of IAM* and cannot be discharged for exercising these rights. Under ... [this] contention, Sewell could oppose the amendment as an individual member of the IAM, even though as an employee of that union his duty was to support actively its passage. This contention seems to be without adequate foundation. Actual conflicts of interest arising from an individual's dual status as union member and employee may properly be resolved in favor of the employer's right to operate its business and to discharge employees for cause.

On April 10, 1970, subsequent to the decision of the NLRB and the Court of Appeals in the unfair labor practice proceeding, and more than three years after his discharge on January 6, 1967, Petitioner brought the instant action in the United States District Court for the Middle District of Alabama, now complaining that the identical discharge violated his LMRDA rights. The District Court dismissed the complaint on the ground that "it is uncontroverted that Sewell was discharged as an employee for insubordination and was not discharged because of his union activity as a member, and the disciplinary action taken against him did not in any way affect his union membership" (Pet. 28-29). The Court of Appeals affirmed on independent and alternative grounds. It held, first, that the action was time-barred because not brought within one year as required by the applicable Alabama statute of limitations (Pet. 36-40). It held, alternatively, that Petitioner's discharge did not violate his LMRDA rights, reasoning that (Pet. 40-42):

> . . . [T]he rights of free expression, and assembly as well as other rights protected by the statute may be exercised fully and freely by any member of the union; the mere fact that a member is an appointed or elected official of the union does not destroy his statutory rights. This conclusion, however, does not permit an employee who accepts employment for the performance of certain specified duties to take the largesse and pay of the union, on the one hand, and, on the other, to completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties . . . . To permit an individual to accept union employment, to receive union pay, and to enjoy the prestige of a union position, while spending his employer's time opposing the plans and

policies he was employed to execute, would in our judgment, be unreasonable. All employees, whether they work for a union or a large commercial company, may be required at times to subordinate personal expression to the responsibilities of their employment. An essential and elemental ingredient of all employment is basic loyalty by employees to the employer in performing the duties of the job for which they were hired. If a conflict of interest arises between an individual's desire to oppose the plans and policies of his employer and the discharge of the duties of the position in which he is employed, fundamental considerations of fair play would require him to remove himself from such a position.

ARGUMENT

1. The threshold and dispositive question on this petition is whether the Court of Appeals correctly concluded that the action is time-barred. Petitioner does not dispute the applicability of Alabama law to provide the appropriate limitations period in the absence of a pertinent federal time-bar. Applying Alabama limitations law to the " 'essential nature' of the claim under the federal law" (Pet. 37), the Court of Appeals concluded that (a) "it is quite clear that the basis of [Petitioner] Sewell's alleged grievance is the claimed denial of rights protected by federal law" (Pet. 39); (b) it is, therefore, a cause of action which arises "from a breach of duty" (Pet. 38), and hence within the one-year limitations period prescribed by Alabama for "Actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated" (Pet. 32, n. 3); (c) Petitioner was admittedly discharged more than one year before the commencement of his action (Pet. 38, n. 12); and (d), accordingly, "his cause of action is governed

and barred by the Alabama Statute of Limitations of one year" (Pet. 40).

To fault the Court of Appeals, Petitioner counters that a union constitution is a contract; that the Union's constitution impliedly incorporates the federal statutory rights created by LMRDA; that a claim of a violation of an LMRDA statutory right is therefore a claim of a violation of a contract right; and, accordingly, that the action is not time-barred because it is within the six-year limitations period prescribed by Alabama for "Actions upon any simple contract or specialty, not herein specifically enumerated" (Pet. 13-16, 38, n. 13). This is a wholly artificial construct. The Court of Appeals correctly concluded that Petitioner's claim is entirely devoid of any foundation in contract (Pet. 38-39). As the Court of Appeals observed, there is nothing "to support an action based on contract" (Pet. 39); rather, Petitioner's "claim is essentially in the nature of a tort for the alleged violation of rights claimed under the Labor Management Reporting and Disclosure Act" (Pet. 39-40).

The limitations question presents no issue which merits this Court's review. The Court of Appeals correctly decided a nonrecurrent and specialized question in the application of Alabama limitations law having no substantial import. Furthermore, the time-bar moots all other questions presented by the petition. As the time-bar is determinative of the action, no other question can be reached, and denial of the petition is therefore required without more.

2. Assuming the action is not time-barred, there is no merit to Petitioner's argument that his right to free speech as a member was abridged by his discharge

because of his insubordination as an employee. Had Petitioner not been a Grand Lodge Representative, duty-bound by his job to promote and execute the policy of the Executive Council and the International President of the Union, he doubtless would be wholly free as a member to oppose the elimination of the post-convention referendum. But he was a Grand Lodge Representative, and in discharging the duties of his job he was bound to support, not oppose, the elimination of that referendum. He could not dilute his responsibility as an employee by invoking his status as a member. He was not free to work on his own terms, in disregard of the "legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge" (*N.L.R.B.* v. *Local Union No. 1229, I.B.E.W.*, 346 U.S. 464, 475 (1953)), simply because he was employed by a labor organization of which he is also a member.

The Court of Appeals therefore correctly concluded that "[a]ll employees, whether they work for a union or a large commercial company, may be required at times to subordinate personal expression to the responsibilities of their employment" (Pet. 42). It is this approach which this Court endorsed in *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), when it recognized that, in the relationship of a governmental employee to his public employer, the employee's fulfillment of his job responsibilities may require him to yield the unrestricted expression of his views which he would otherwise enjoy as a purely private person:

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regula-

> tion of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

It is this necessary reconciliation of these competing interests which underpins the ultimate and narrow holding of the Court of Appeals: "Considering all the facts involved, it is our conclusion, limited to the particular facts and circumstances of this case, that the Union had the right to terminate . . . [Petitioner's] employment for insubordination" (Pet. 43). Furthermore, contrary to Petitioner's claim (Pet. 17-20), there is no conflict of decision. None of the cases cited by Petitioner presents the situation of an individual who as a member acts in default of his job responsibilities as an employee. This case alone has brought to the fore the problem of reconciling the dual roles of a single individual who is both a member and an employee of his union-employer. The Court of Appeals has sensitively accommodated the two roles, and reached a just conclusion "limited to the particular facts and circumstances of this case . . . ." No further review is warranted.

3. Finally, again supposing that the action is not time-barred, there is no merit to Petitioner's argument that the Court of Appeals erroneously assumed that it was Petitioner's duty as a Grand Lodge Representative to support the elimination of the post-convention referendum, and that he is entitled to a trial upon that alleged issue of fact (Pet. 9, 17, 20-25). This argument presents no question meriting this Court's review for any and all of three reasons.

(a) In concluding that it was common ground that it was Petitioner's duty as an employee to support elimination of the post-convention referendum, the Court of Appeals stated in part that "[c]oncerning these facts no dispute appears to exist since they are discussed without contradiction by the parties . . ." (Pet. 34). Petitioner now asserts that he did contradict the fact, but nothing in his petition even colorably supports this assertion, for the excerpts from his reply brief which he quotes show only that he disputed the power of the Union to require his support; he did not dispute that in fact his support was required (Pet. 21-23). In any event, whether or not the Court of Appeals accurately apprehended his position presents no question warranting this Court's review.

(b) The Court of Appeals further observed that the facts upon which it predicated its decision "correspond essentially with the facts found" in the companion unfair labor practice proceeding (Pet. 34). Petitioner disputes the validity of reference to the facts found in the unfair labor proceeding (Pet. 23-25), but he does not in any way particularize any deficiency in the findings or supporting evidence, nor does he assert that any new or additional evidence is available to him. Accordingly, his altogether abstract attack upon the verifying reference to the findings in the unfair labor practice proceeding presents no question which merits this Court's review.

(c) Finally, Petitioner's challenge to the factual predicate of the decision of the Court of Appeals is self-stultifying, for he admitted in his testimony in the unfair labor practice hearing every fact upon which the Court of Appeals relied. He admitted that a Grand

Lodge Representative is the "representative of the International President at all times" whose "job is to execute . . . the policies of the International President" (A. 230-231).[1] He admitted that he knew that the International President and the Executive Council "wanted full support" from him of its position to eliminate the post-convention referendum (A. 235, 238). And he admitted that he knew that his conduct in fighting against elimination of the post-convention referendum was in defiance of the Executive Council and the International President (A. 231):

> Q. And you knew that in doing this, you were acting in opposition to the Executive Council's position in this matter, did you not?
>
> A. Yes sir.
>
> Q. And you knew you were acting in opposition to the position of the International President in this matter, did you not?
>
> A. I sure did.

It can hardly be clearer that the Court of Appeals correctly concluded that there was no triable issue of fact. At all events, it is surely plain that no issue warranting this Court's review is presented.

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[1] The symbol "A." refers to the Joint Appendix in the Court of Appeals in the unfair labor practice proceeding.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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